United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

77-1062

Pro-Se

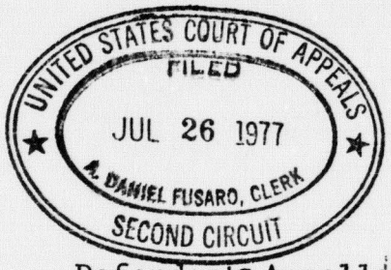
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET No. 77-1062

B P/S

United States of America,
Defendant-Appellee,

v.



Gino Reda,
Luis Reda,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York

Appellant's Pro-Se Petition for Rehearing and Rehearing En Banc

Gino Reda
#03824-158
Box 600
Eglin Air Force Base
Florida 32542

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

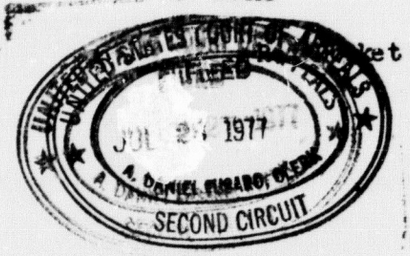
77-1062

UNITED STATES OF AMERICA,
Appellee,

-against-

GINO REDA,
Appellant Pro Se.

APPELLANT's Pro-Se Petition for Rehearing and Rehearing En Banc



Docket # 77-1062

To The Deputy Clerk:

Dear Sir;

I am requesting to recall Mandate and Stay reissuance pending determining Certiorari and for leave to file a Petition for a Rehearing or in the alternative, a Rehearing En Banc, out of time for the following reasons:

On May 18, 1977, I filed a Motion for a Rehearing or a Rehearing En Banc with this Court but I directed same to the Chief Justice instead of the Deputy Clerk of the Court. A copy of this Motion is herein.

On June 12, 1977, I had my daughter call the clerk of this Court requesting the status of this Motion. Though this Motion was filed timely, May 18, 1977, I was informed that same was out of time because it was lodged in the Judges Chambers, never received untill June 9, 1977, and the allotted time for filing had expired.

I have been informed by the Deputy Clerk of this Court, Mrs. Korecki, that due to the Motion being filed timely but being invalid presently, in order for my relief here I must request accordingly and same will be activated upon receipt of this request.

I am also forwarding a copy of the letter I received from my Attorney and filing Pro Se. I have written Mr. Seidler and exonerated him of his duties any further.

The Deputy Clerk, Mrs. Korecki, on June 10, 1977, forwarded to me a copy of this Courts decision which I received June 15, 1977.

After having read the Courts decision I contend that this Court was in error by affirming the decision of the District Court and request this Rehearing or in the alternative, a Rehearing En Banc, substantiated by the following facts:

I further contend that this Court contradicts itself in this instant case and is in conflict with prior decisions and the law of this Circuit. Supporting these contentions for the appellant are other cases that have been brought before this Court and this Court has sustained petitioners position.

United States v Dzialak, 441 F 2d 212 (C.A. 2nd Cir. 1971).

United States ex rel Nickens v LaValle, 391 F 2d 123 (C.A. 2nd Cir. 1968).

The incidents in these cases have been arguementive and identical to this instant case as cited in my original brief on appeal.

Regarding Point 1.

THE SEALED BOX THAT WAS REMOVED FROM THE APPELLANTS PERSON AT THE AIRPORT.

This search and seizure was not proper as a search incidental to an arrest. This Box was seized without a search warrant, thus invoking the appellants Forth Amendment rights and Fifth Amendment rights against self-incrimination.

This box was also seized from the appellant in one District and removed to another District. Approximately four (4) hours later, opened and searched by the D.E.A. agents, without their having obtained a search warrant, at a time and place remote from the arrest.

It is the contention of the appellant that the search of this box seized at the Airport at the time of arrest was violative of the appellants Fourth Amendment rights against unreasonable search and seizure.

At the time the appellant was arrested, no probable cause existed to seize or search this box. No search warrant had been obtained with regard to the box or its contents. At the suppression hearing below the Government did not nor could they show exigent circumstances to bring the search into one of the exceptions to warrant requirements.

At the time of his arrest, the appellant was placed into the custody of federal agents and the box physically removed from his possession. Once said box was seized and removed from the appellant there was no danger that the appellant could grab a weapon from it to injure the officers nor could he destroy its contents.

At the time the box was opened and searched in Manhattan, the appellant was not present. No exigent circumstances existed to justify the opening and subsequent search of the box without a search warrant. This search was made about 2:00 P.M. with Magistrates readily available to issue warrants. The federal agents who opened and searched the box DID HAVE ample opportunity to apply for a search warrant after seizing the box but failed to do so. Probable cause in itself does not justify a warrantless search and seizure of evidence, since absent exigent circumstances a search warrant must first be obtained from an impartial judicial officer.

State v Spietz, Alaska 1975, 531 P. 2d 521.

United States v Hunt, 336 F. Supp. 172, Supp. Pamph., recersed on other grounds 505 F. 2d 931, certiorari denied 95 S. Ct. 1974.

Although the Fourth Amendment does not prohibit all warrantless searches and seizures, the presumption has always been that a warrant should be obtained whenever practicable. (Per Wright, Circuit Judge, with three Judges concurring and three additional Judges concurring in the judgement.) Zweibon v Mitchell, C.A.D.C. 1975, 516 F. 2d 594.

To prevail on exigent circumstances theory of a warrantless search the Government must establish (1) probable cause for the search and (2) reasonable belief that there is a danger that the contraband will be removed or destroyed.

United States v Ciovacco, D.C. Mass. 1974, 384 F. Supp. 1385, reversed on other grounds 581 F. 2d 29.

The probable cause-exigent circumstances exception to warrant requirements, as with all exceptions to warrant requirements, depends on the reasonableness of the search. Id.

When law enforcement officers have prior knowledge of existence and location of property which he has probable cause to believe is illegally possessed, as well as ample opportunity to obtain judicially sanctioned search warrant, the Fourth Amendment mandates that he follow this procedure.

United States v Sanches, C.A. Ohio 1975, 509 F. 2d 886.

Because only a valid warrant indicates the fullest extent constitutional balance between privacy and law enforcement, an officer must make every reasonable effort to secure a warrant.

Fankboner v Robinson, D.C. Va. 1975, 391 F. Supp. 542.

Since no search warrant was obtained prior to the search of the box and no exigent circumstances existed justifying a search without a warrant, the search of the box was unreasonable and in violation of the appellants Fourth Amendment rights.

The search and seazure and the proposed use of the notes allegedly written by the appellant also violated the appellants Fourth Amendment rights. Further, since the notes are testimonial in nature, their proposed use against the appellant in a criminal proceedure is violative of the appellants Fifth Amendment rights against self-incrimination.

All of these facts are spelled out clearly in the following cases that were also submitted in my brief for argument:

McDonald v United States, 335 U.S. 451, (1948).

Trupiano v United States, (1948), 334 U.S. 669.

United States v Rabinowitz, (1950), 339 U.S. 56.

Rent v United States, 209 F 2d 393 (C.A. 5th. Cir. 1954).

Preston v United States, (1964), 376 U.S. 364.

Chimel v California, (1968), 395 U.S. 752.

United States v Jeffers, 342 U.S. 48, 51.

United States v Free, 437 F 2d 631 (C.A. D.C. Cir. 1970) page 633.

Regarding Point 2.

PROPERTY SEIZED FROM PREMISES 1910 HONE AVENUE, BRONX, NEW YORK.

On August 26, 1977, and on or about 2:30 O'Clock P.M., a search of the premises at 1910 Hone Avenue, Bronx, New York was conducted allegedly pursuant to a valid search warrant. The search warrant issued on August 25th, 1977, described the property to be searched for and seized as " A quantity of cocaine hydrochloride, and other paraphernalia ".

Upon information and belief the aforesaid search was conducted more than twenty four (24) hours after the issuance of the search warrant and in violation of the terms and conditions of said warrant which limited its application to within twenty four hours of its issuance.

Upon information and belief, the federal agents after discovering what is alleged to be cocaine in a samsonite briefcase, continued searching and seized numerous papers, writings, documents and other property alleged to be the appellants and what the Government offered into evidence as belonging to the appellant, thus converting a specific warrant into a general one, or exploratory one which is prohibited and violative of the petitioners Fourth Amendment rights.

Among the articles seized by the federal agents were, a postal scale, the samsonite briefcase, travel brochures, Airlines flight schedules, five hundred dollars ($500.00), shuttle passes, a telephone address book, the contents of a vacume cleaner bag, telephone desk cards, a scale, a notebook with writings, a jar of lactose, a passport in the appellants name, a design for a grave memorial, telephone bills, a pad with writings, a quantity of substance alleged to be marijuana, a vaccination card in the appellants name, cigarette wrappers, a plastic mat from top the refrigerator, and numerous personal papers alleged to be the appellants including a business check book and occupational licenses in the appellants name.

It is clear that substantially all of the items seized by the agents with the exception of the alleged cocaine, WERE NOT particularly described in the search warrant as required by Rule 41 of the Federal Rules of Criminal Proceedure and the Fourth Amendment of the United States Constitution.

With the exception of the quantity of substance alleged to be marijuana, no other property constituted contraband that could have been seized without a search warrant.

The application for the search warrant that issued for the premises at 1910 Hone Avenue does not contain facts sufficient to give probable cause for the issuance of a search warrant.

There is no showing in the application that the cocaine was or had ever been at that address, nor do the affiants allege that the appellant told the agents that it was. The absence of such essential facts setting up probable cause are in conflict with the decision of the United States Supreme Court as in the following cases:

United States v Canestri, 518 F. 2d 269, 273 (2d Cir. 1975).

Spinelli v United States, 393 U.S. 410 (1969).

Aguilar v Texas, 378 U.S. 108, 111 (1964).

Appellant herein avers to the letters and petition herein mentioned on page one (1) of his petition and attaches said letters and Motion for Rehearing as appellants exhibits A, B, and C and made a part hereof.

The personal papers and effects the Government contends are the appellants and which the Government had indicated would be used as evidence against the appellant are testimonial in nature and their seizure against the appellant is violative of the appellants Fifth Amendment rights against self-incrimination.

The law is well settled that Fourth Amendment limitations on search and seizure are to be more strictly applied against the Government, when the property seized consists of personal papers, writings and documents belonging to the appellant.

It is clear from the above that the search and seizure of property from the aforementioned premises allegedly pursuant to a search warrant, was unreasonable and constitutionally prohibited. The agents proceeded under a search warrant that was narrow in scope. It only authorized the seizure of cocaine hydrochloride and other paraphernalia and a search therefore. After finding what they believed to be the object of the search, the agents began a general search rummaging about the entire apartment. They seized articles and property plainly without the scope of the search warrant and not described therein. Some of the items seized during such unlawful search are testimonial in nature and cannot be used against the appellant without violating his Fifth Amendment rights. Other property seized clearly has no nexus to any crime or has no nexus to the appellant and was seized without the requisite probable cause.

Rule 41 (e) of the Federal Rules of Criminal Proceedure states:

> " A person aggrived by an unlawful search and seizure may move the District Court in which the property was seized for the return of the property and to surpress for use as evidence anything so obtained on the ground that...(3) the property seized is not described in the warrant..."

The Fourth Amendment to the United States Constitution provides in part:

> "... and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

In Marron v United States, 275 U.S. 192, 196 (1927) the Supreme Court held that the Fourth Amendment meant:

> " The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is taken, nothing is left to the discretion of the officer executing the warrant..."

The above language from Marron has been cited with the approval by the Supreme Court and reaffirmed on various occasions. See: Stanford v Texas, 379 U.S. 476 (1964); Stanley v Georgia, 349 U.S. 557 (1968); Berger v New York, 338 U.S. 41 (1967).

In United States v Dzialek, 441 F. 2d 212 (C.A. 2nd. Cir. 1971) This Court reversed a conviction based on evidence seized pursuant to a search warrant containing insufficient particularization. The Court held that such seizure violated the Constitutional requirements that search warrants must particularly set forth that which is to be seized.

In United States ex rel Nickens v LaValle, 391 F. 2d 123 (C.A. 2d Cir. 1968) this Court rejected arguments that Warden V. Hayden, 387 U.S. 294 conferred discretion on officers to seize property as evidence though not particularly described in the search warrant. The Court in rejecting such argument held that the Marron case (Supra) specifically prohibited the seizure pursuant to a search warrant, of any evidence not particularly described in the warrant.

In the instant matter, it is clear that all property not described in the warrant must be suppressed as evidence against the appellant. This is especially so where as here, most of the property seized after the object of the search warrant was located and seized. United States v Highfill, 334 F. Supp. 700 (D.C. Ark. 1971). See also: United States v Baldwin, 46 F.R.D. 63 (1969); and United States v Spallino, 24 F. 2d 567.

A search warrant must not only describe with reasonable specifics the items to be seized but must limit the search to those places where the items sought are likely to be found, and must require that a list of the items seized behanded over to the authorizing magistrate. United States v Rogers, D.C. Va. 1975, 388 F. Supp. 298.

Requirements that a search warrant shall particularly describe place to be searched and person or things to be seized was designed to make a general search impossible by preventing seizure of one thing under a warrant describing another. State v Joseph, R.I. 1975, 337 A. 2d 523.

Based upon these contentions and allegations I am requesting that this Court grant me a Rehearing or in the alternative, A Hearing En Banc, and take into consideration the support of the Constitutional Law, Statute Law, and Case Law that this Court has judged on as has been brought forward in this instant case and act accordingly. Further it is prayed that should the Court deny the Rehearing, or alternatively the Rehearing En Banc, then a Stay of Mandate be granted in order that petitioner can apply for Certiorari, to the United States Supreme Court.

Respectfully Submitted,

June 20, 1977.

Gino Reda 03824-158 Pro Se.
Box 600
Eglin Air Force Base
Florida 32542

copy sent to:

Mr. Frederico Virella
Assistant United States Attorney
One St. Andrew's Plaza
New York, New York
10007

EXHIBIT (A)

June 18, 1977

Mr. Alan Seidler
401 Broadway
New York, New York
10013

Dear Mr. Seidler;

In regard to your letter dated May 18, 1977, I had felt that you had exonerated yourself as of then from any further proceedings in regard to my case. Whether I am reading your expressions rightly or not, at this point I would like for you to exonerate yourself completely as I will continue further Pro Se. I believe that this will answer the last letter I received from you dated June 13, 1977. I am sending a copy of this letter to the court and if any further paper work is necessary for you to be exonerated, let me know and I will follow suit to accomplish same.

I have one final request, I would like all the papers including all the minutes of my case so I can follow through with the case further and act accordingly.

Thank you.

Sincerely,

Gino Reda

Gino Reda 03824-158 Pro Se.
Box 600
Eglin Air Force Base
Florida 32542

cc: United States Circuit Court
For The Second Circuit
U.S. Courthouse
Foley Square-New York

6/28